No. 8779

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA

REPLY BRIEF FOR THE UNITED STATES

CARL McFARLAND,
Assistant Attorney General.
ROY W. STODDARD,
C. W. LEAPHART,
Special Assistants to the Attorney General.
THOMAS HARRIS,
ROBERT KOERNER,
Attorneys, Department of Justice,
Washington, D. C.

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STATEMENT

The appellees not being in entire agreement with the statement of facts made by the Government (Gov't Br. 3–15) have included in their brief (Br. 2–15) a complete statement of their view of the evidence. It is believed that much of the matter the appellees have set out is immaterial to a decision of this case, and that many of their statements are further objectionable in that they either have no support in the record whatsoever or are founded upon conflicting evidence as to which the district court made no findings.

A considerable part of the appellees' statement relates to irrigation conditions upon the Walker River Indian Reservation and in the Walker River basin generally (Br. 2–6). They describe the topography of the river basin, the insufficiency of water during certain seasons to meet the requirements of the cultivated lands, and their own storage of water to prevent waste (Br. 2–4). They assert that even under normal conditions no water would reach the Walker River Reservation during certain months of some years, that there is considerable loss of water in transit between their lands and the reservation, and that, due to these losses, the acreage that can be irrigated on the reservation with a given amount of water is less than the acreage that can be irrigated upstream (Br. 5).

The chief objection to this portion of the appellees' statement is that it has no relevance to the issues presented to this court upon this appeal. Appellees apparently believe that it will assist them to defeat the rights of the Indians if they can show that they could make better use of the water than could the Indians, or that to require them to recognize the Indians' rights would cause them loss disproportionate to the gain to the Indians. Such considerations are not relevant even between ordinary private appropriators. As said in *Tonkin* v. *Winzell,* 27 Nev. 88, 100, 73 Pac. 593, 595 (1903):

> * * * we cannot sanction a policy which inevitably would result in depriving the

> prior and lower appropriator for the benefit of the later claimant nearer the head of the stream, because the latter would have a greater quantity of water, and consequently more benefit, and would save the seepage and evaporation occasioned by the flow further down to the lands of the earlier settler.
>
> The enforcement of such a doctrine would overthrow the long, well-established, and just principles of the law, and result in legal confiscation.[1]

Even if such considerations were pertinent between private individuals, they could not be invoked against water rights of Indians. See *United States* v. *McIntire* (C. C. A. 9, January 31, 1939); *Conrad Investment Co.* v. *United States,* 161 Fed. 829, 831–832 (C. C. A. 9, 1908).[2]

Appellees stress (Br. 5) the finding of the district court (R. 495–496) that "Even under nat-

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[1] See also Wiel, The Pending Water Amendment (1928) 16 Calif. L. Rev. 169, 185; Long, Irrigation (2 ed. 1916), sec. 129.

Recent California decisions, pursuant to an amendment to the state constitution prescribing "reasonable use" of water, permit in some circumstances what amounts to condemnation of a water right by one able to make better use of the water, upon payment of damages (i. e., compensation). See *Peabody* v. *City of Vallejo*, 2 Cal. 2d 351, 374–375, 380, 40 P. 2d 486 (1935); Wiel, Fifty Years of Water Law (1936) 50 Harv. L. Rev. 252; Wiel, The Pending Water Amendment (1928) 16 Calif. L. Rev. 169. No such doctrine has been urged or could be entertained in this case, or in any case involving federal, or perhaps interstate, interests. See *Peabody* v. *City of Vallejo*, 2 Cal. 2d 351, 366, 40 P. 2d 486 (1935).

[2] See *infra*, pp. 29–30.

ural conditions, that is, without upstream diversions, the water would not, in some years of low flow, reach the lands of the Reservation by the end of July by reason of seepage and high evaporation loss." It is true that if all the water of the river would *always* be lost by seepage and evaporation before it reached the reservation the appellees' diversions would never injure the Indians, and the latter would have no cause of action. But there is no contention that such is the situation—all that is claimed is that in some months in dry years the diversions will not injure the Indians. Assuming that the Indians have a right only to so much water (up to 150 cubic feet) as would reach the reservation under natural conditions, and that the appellees are entitled to a decree directing the water master to permit them to divert water at any time when, under natural conditions, no water would reach the reservation,[3] the burden of proving to the

[3] This assumption posits to the Indians rights in the river less than those which the law actually accords to them. They are entitled not only to the water, up to 150 feet, which would reach the reservation under natural conditions, but to the maintenance of the water table below the river bed as it would be maintained by the full flow of the river under natural conditions. And they are entitled that the water table be so maintained even in periods when no water would reach the reservation, in order that when the flow of the river is subsequently augmented water will reach the reservation as soon as it would under natural conditions, instead of being absorbed by an unnaturally dry river bed and an unnaturally low water table. See Wiel, The Pending Water Amendment (1928) 16 Calif. L. Rev. 169, 185–191; Wiel, Law of Underground Water (1929) 2

water master that any particular diversion proposed would not injure the Indians would always be on the appellees. *Peabody* v. *City of Vallejo,* 2 Cal. 2d 351, 381, 40 P. 2d 486 (1935); 1 Wiel, Water Rights (3d ed., 1911), sec. 299, p. 310. And since the appellees have objected (Br. 67) to the form of decree suggested by the Government as "so indefinite as to destroy the values of all the lands of the Appellees," it is hardly to be supposed that they mean to suggest a decree based on a hypothetical normal flow under hypothetical normal conditions.

Some of appellees' statements as to irrigation conditions are made with respect to matters as to which the district court made no findings and as to which the evidence was conflicting. Appellees say, for instance (Br. 5, paragraph 2), that by reason of evaporation and seepage losses in the lower reaches of the river the irrigation of each additional acre of land on the reservation would require water sufficient to irrigate two acres of land upstream, and that the white settlers would be deprived of water to that extent. The district court made no findings with respect to this matter, and while the assertion of the appellees is supported by some testimony there is also testimony to the contrary. For example, appellees' witness, J. I. Wilson, the president of the Walker River Irrigation District, estimated that the amount of water neces-

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So. Calif. L. Rev. 358, 363; Wiel, Fifty Years of Water Law (1936) 50 Harv. L. Rev. 252, 261–265.

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sary to irrigate 10,000 acres on the reservation would be sufficient to irrigate only 12,000 or 15,000 acres up above (R. 812). See also R. 951–952.

In the footnote on page 5 of their brief, the appellees invite the Court to infer that the relief sought by the Government would turn 111,000 acres of land back to desert, destroy land values of $4,000,000, and make 3,000 white settlers dependents, while no value would accrue to the 520 Indians living on the reservation. According to the appellees' own assertion, just discussed, the 150 cubic feet of water necessary to irrigate 10,000 acres of reservation lands would irrigate only 20,000 acres upstream—not 111,000. There is testimony, moreover, that in ordinary years there is sufficient water in the river, without storage, to irrigate the upstream lands now irrigated and 10,000 acres on the reservation besides (R. 951–952). And while the decree sought would establish the right of the Indians to 150 cubic feet of water as a maximum, they would at no time receive a greater flow than they could apply to beneficial use on the reservation lands. Only about 2,100 acres of reservation land are now under irrigation (R. 246, 496), and the full 150 cubic feet per second can not be applied to a beneficial use until much more land has been brought under irrigation. Furthermore, the storage dam recently built for use in connection with the reservation (Appellees' Br. 12, Appendix C) will presumably enable the Indians to irrigate their

lands with less direct flow water than would otherwise be required.

Appellees (Br. 6) question the Government's assertion that there are 10,000 acres of irrigable land in the reservation. It is true that the district court made no finding upon this matter, doubtless because it was irrelevant in the view the district court took of the case, and if the case is reversed the district court should be directed to make a finding as to the total irrigable acreage upon the reservation.[4]

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[4] The testimony as to the amount of irrigable land on the reservation varies widely. Mr. Kronquist and Mr. Stevens, witnesses for the United States, testified that 10,000 acres are irrigable (R. 614, 616, 627, 633, 634, 636, 644, 655, 932, 950, 956) except in exceptionally dry years (R. 644, 956–957). Mr. Beemer reported between 6,000 and 7,000 acres irrigable in 1918 or 1919 (R. 857). Mr. Taylor, for the appellees, testified that water would be available for the irrigation of 10,000 acres during only a small part of the season, and that in many years, due to the shortage of water, not more than 2,000 to 3,000 acres could be practicably irrigated (R. 684, 704–705, 712, 721). Other witnesses for the appellees testified that 10,000 acres could not be irrigated without storage facilities (R. 793, 813, 818). The number of irrigable or arable acres is said in other parts of the record to be 1,200 acres (R. 764); 3,000 acres (R. 757, 759); 4,000 acres (R. 593, 972); 6,000 acres (R. 966); 20,000 acres (R. 961). These differences, and especially those between the Government's and appellees' witnesses, apparently result from lack of common definition of the term "irrigable." Since the purpose of determining the irrigable acreage in this case is to determine the maximum amount of land for which the United States may divert water, considering the possible future needs of the Indians (Gov't Br. 57–61), the term "irrigable land" should include all land susceptible

Appellees assert that in 1859 and thereafter the Pahutes were at war with the whites (Br. 8, 36). This assertion is directed at the statement of the Government (Br. 32, note 8), "that the creation of the reservation had at least the tacit consent of the Indians." As stated in the Government's opening brief (Br. 32), the United States undoubtedly has the power to create a reservation and assign Indians to it regardless of their consent. The hostitlity or friendliness between the Indians and the United States is therefore immaterial. (See also *infra,* pp. 30–31.)

Furthermore, the appellees' assertion has no support in the record. While the record shows

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of agricultural use that is practicably accessible to water from the Walker River. *Cf. United States* v. *Conrad Investment Co.*, 156 Fed. 123, 130 (C. C. D. Mont., 1907), 161 Fed. 829, 833 (C. C. A. 9, 1908); *United States* v. *Hibner*, 27 F. 2d 909, 911 (D. Idaho, 1928). Whether the amount of water in the river under normal conditions is sufficient to irrigate all the available arable lands of the reservation in all seasons is irrelevant to the question of the extent of irrigable lands, but relates instead to the proposition, heretofore discussed, that the Indians are only entitled to so much water as would reach the reservation under natural conditions, regardless of the quantity of irrigable land in the reservation. In this light the testimony of appellees' witnesses, who estimated the irrigable acreage of the reservation at a low figure because of the shortage of water in certain seasons, is entirely reconcilable with that of the Government's witnesses, and the preponderance of the evidence is that there are 10,000 acres of irrigable land. The widely variant figures stated in the last-cited portions of the record are for the most part unreliable since they represent casual estimates made under varying definitions.

hostilities between Indians and whites in Nevada in 1859 and later, nothing in the record or in the sources relied upon by the district court in its first opinion (R. 396–398) shows that the Pahutes of the Walker River Reservation engaged in these hostilities. The assault on Williams Station in May 1860 was made by Pyramid Lake Pahutes, Bannocks, and Pit River Indians (R. 574–575). The letter of August 29, 1860, from the Secretary of the Interior to the Secretary of War, asking the assistance of the United States troops, relates to difficulties with the Pyramid Lake Pahutes (R. 576). The letter of November 22, 1861, from General Wright to Governor Nye concerning protection for the overland mail route does not show hostilities on the part of the Walker River Indians (R. 738). The Governor writes that although the Indians were "testy and uneasy," his Indian Agent had gone among the Pahutes and found them "all quiet" (R. 602). The letter of Governor Roop of Nevada Territory, of February 12, 1860, to General Clarke, recites the murder of eight white men by Pahutes but does not indicate that the Walker River Indians were involved (R. 770–772). The quotation from Thompson and West (R. 773–775) refers to a proposed assault by a large body of Indians upon Fort Churchill in 1861. The Indians assembled near the mouth of the Walker River, but the assault was averted by Wasson, then acting Indian Agent, who "by argument and persuasion" diverted the Indians from the attempt.

Involved in this plot were "Bannocks from Idaho and Oregon, and representatives of the Pah-Utes from far and wide." There is no direct showing that the Walker River Reservation Indians were involved and the history states that those from the most isolated places were most intent on commencing the raid.

So far from showing a state of war between the Pahutes and the whites, the portions of the record relied upon by appellees amply support the view that the Pahutes were anxious to secure peace (R. 574, 576, 585–586, 592, 602, 754). The letter of June 23, 1860, from Indian Agent Dodge to the Commissioner of Indian Affairs reports that the Walker River Reservation Indians were friendly and promised not to join the hostiles, against whom they asked protection (R. 585). In 1865 Indian Agent Campbell wrote the Commissioner that the Walker River Indians would never again wage war with the whites unless some flagrant act of injustice was done them. He stated that the Walker River Valley above the reservation was settled with a class of men so embittered against the Indians that "they are doing everything in their power to get the Indians into a war for the purpose of getting them exterminated" (R. 592–593). A report made in 1862 by the Executive Department of Nevada Territory to the Secretary of the Interior and by him sent to Congress, reports disturbances among the Owens River Indians in

California and the fear and uneasiness of the Pahutes lest they themselves might become involved in the difficulties (R. 603). The report of the Superintendent of Indian Affairs of Nevada to the Commissioner in 1866, says of the Pahutes, "Upon the whole, they have been peaceable, have yielded readily to the will of the Government, and are now cheerfully obedient to its laws" (R. 754).

In recognition of the fact that peace could be preserved if the Indians were given a tract of land for their exclusive occupancy, steps were taken to exclude trespassers from the reservation (R. 576–577, 585–586). While the Government found it necessary, as stated by the appellees (Br. 8), to supply the Indians with food, blankets, clothing, and fancy articles, this was done in the belief that the Indians would soon become prosperous and happy and the agency be made self-sustaining (R. 587, 588–589, 591, 599). The early letters of the Indian Agent and the conference between the Indian Chiefs and Governor Nye, cited from the record by the Government (Br. 9), and reviewed by appellees (Br. 8), together with the above facts, show the purpose of the Government, in creating the reservation in 1859, that the Indians should live upon it and sustain themselves. While the record tends to show that the Indians at first sustained themselves from the natural products of the soil, and that the abundance of these products was a material factor in the selection of the res-

ervation, the Government cannot have intended, in its awareness of oncoming civilization, that the perpetual fare of the Indians would be pine nuts, roots, and fish, nor that the Indians would be forever reliant upon the Government for their clothing and supplies. The persistence of the Indian Agents, and, in fact, of all the governmental authorities who had occasion to survey the condition of the Pahutes in the Walker River Valley, in recommending that they be furnished tools and supplies and be taught to farm, clearly indicates that the Government did not so intend. So, too, do the numerous acts of Congress appropriating money for "presents of goods, agricultural implements, and other useful articles, and to assist them to locate in permanent abodes, and sustain themselves by the pursuits of civilized life." See, for example, the Act of March 3, 1863, c. 99, 12 Stat. 774, 791, and others cited *infra,* p. 27.

The statements of the appellees on pages 9 and 10 of their brief are directed to showing that cultivation on the reservation was not extensive and that the effort to teach the Indians to farm was not very successful, for lack of agricultural implements and for lack of ability or desire on the part of the Indians. But the water rights of the Indians rest on the facts that the reservation was created and the Indians placed thereon for their civilization and self-sustenance, and that the water of the Walker River was necessary to accomplish

that purpose, and not upon their immediate success or failure in cultivating the reservation.[5]

Appellees have referred in their brief (Br. 12) and in Appendix C, to the fact that a small storage reservoir has been built by the Government for the irrigation of the reservation. Assuming that this information is properly before this Court,[6] it does not affect the case. The Indians' direct flow rights obviously are not affected by the acquisition of storage facilities for them.

ARGUMENT

I

The United States, by the creation of the Walker River Indian Reservation, impliedly reserved for the Indians sufficient water of the Walker River for the irrigation of the irrigable lands of the reservation

A. The United States, when it created the Walker River Indian Reservation, had power to reserve water for the irrigation of the lands of the reservation

In answer to the Government's contention that the United States, by the creation of the Walker River Indian Reservation, impliedly reserved for the Indians sufficient water of the Walker River for the irrigation of the irrigable lands of the reser-

[5] The record shows, moreover, that the failure of the Indians to cultivate their land more extensively was due in large part to the lack of water in July and subsequent months (R. 652–653), and that this lack of water resulted largely from upstream diversions (R. 963).

[6] That it is not, see *United States* v. *Knight's Administrator*, 1 Black 488, 489; *Russell* v. *Southard*, 12 How. 139, 158–159; *Roemer* v. *Simon*, 91 U. S. 149.

vation, appellees argue (Br. 16–25, 35–36, 48–50, 53) that Congress, by statutes enacted in 1866, 1870, and 1877, and by the admission of the western States to the Union "has relinquished control over the waters of western streams," and that the water rights of the Indians in this case must be determined by the local law of California and Nevada. Appellees also argue (Br. 29) that the power of the United States to reserve water for Indians rests on the treaty power, and that it cannot be exercised in a State after its admission to the Union.

The answer to these contentions is that the reservation was created in 1859, and that even assuming that control over the water of western streams passed to the States upon their admission to the Union, or by the statutes enacted in 1866, 1870, and 1877, the United States had power in 1859 to reserve water for the irrigation of the reservation.

1. *The reservation was created in 1859.*—The facts as to the creation of the reservation are set out in the Government's opening brief, pp. 7–8. That the steps there related were effective to create the reservation in 1859, as both the master (R. 258–260) and the district court (R. 392) held, is clear.

In *Northern Pac. Ry. Co.* v. *Wismer,* 246 U. S. 283, the Supreme Court held that an Indian reservation had been validly created by administrative action very similar to that which was taken in the case of the Walker River Indian Reservation.

In the *Wismer* case the United States granted to a railroad company land within a certain distance of each side of the railroad line which was "not reserved, sold, granted, or otherwise appropriated" at the time the line of the railroad was definitely fixed. The railroad line was definitely located in October 1880, and the question was whether certain land otherwise within the grant had been validly set aside as an Indian reservation before that date. The creation of the reservation rested on the following facts: In 1877 Colonel Watkins, described as an Indian inspector, together with an army officer, had, without specific prior authorization, signed an agreement with an Indian tribe setting aside the reservation for the tribe. In the same year Colonel Watkins reported the agreement to the Commissioner of Indian Affairs, and recommended that the described territory be reserved for the tribe. Later the same year Colonel Watkins moved onto the reservation such Indians of the tribe as were not already there, and reported this action to the Commissioner of Indian Affairs who approved it and communicated it to the Secretary of the Interior, who, in turn, communicated it to the Senate in 1878. In September 1880, an army officer in the field issued an order directing the military force under his command to protect the reservation against settlement by settlers until survey or until further instructions. In January 1881 the President, by executive order,

formally set aside and reserved the territory for the Indians.

The Supreme Court held that the reservation was validly created at least as soon as January 1878 when the Secretary of the Interior indicated his approval of the creation of the reservation by sending the report of Colonel Watkins to the Senate. The Court said (246 U. S. 283, 287–288):

> The plaintiff in error concedes, as it must, that if the Secretary of the Interior approved the action taken by Colonel Watkins prior to the filing of the plat of its line on October 4, 1880, the reservation must be considered as lawfully established and the lands thereby removed beyond the scope of the grant to the Railroad Company. (*Wilcox* v. *Jackson,* 13 Pet. 498, 512; *Wolsey* v. *Chapman,* 101 U. S. 755, 769; *Wood* v. *Beach,* 156 U. S. 548; *United States* v. *Midwest Oil Co.,* 236 U. S. 459; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States,* 244 U. S. 351, 357.) And reservations made by heads of bureaus, such as the Commissioner of the General Land Office, or the Commissioner of Indian Affairs, in the administration of the matters committed to their charge, stand upon the same footing where the Secretary of the Interior is informed of their action, and where, as in this case, he either expressly or tacitly approves the same. *Spencer* v. *McDougal,* 159 U. S. 62.
>
> Such being the law, we cannot doubt that the sound inference from the stipulated facts as we have stated them is that, with

> full understanding of the situation the Secretary of the Interior and the Commissioner of Indian Affairs approved the action of Colonel Watkins not later, certainly, than the sending of his report to the Senate on January 23, 1878, which was almost three years prior to the filing of the railway company's plat, and that the Executive Order of the President on January 18, 1881, simply continued and gave formal sanction to what had been done before.

In addition to the decisions cited in the above quotation, see *Minnesota* v. *Hitchcock,* 185 U. S. 373, 389–390, where it was said:

> Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

And see *Donnelly* v. *United States,* 228 U. S. 243, 257; *Wilbur* v. *United States,* 46 F. 2d 217, 219–220 (App. D. C., 1930); *Belt* v. *United States,* 15 Ct. Cl. 92, 107–108 (1879).

In 45 L. D. 502 (1916), the Department of the Interior, ruling upon a conflict similar to that in the *Wismer* case, formally held that the Pyramid Lake Reservation, which was created at the same time and by the same steps as was the Walker River Reservation, was validly established in 1859. The opinion states (p. 503):

> It is well settled that the acts of the heads of Departments must be held to be the acts

> of the President [citing cases]. The subsequent order of the President therefore was unnecessary for the purpose of establishing the reservation, and merely recognized and declared what had already been done.[7]

Appellees (Br. 38–39) treat the question as one of ratification, or relation back, and argue that the executive order in 1874 could not validate the creation of the reservation as of 1859 so as to cut off intervening rights. But no such issue is involved. The question is whether the action of the administrative officials in 1859 was effective to create the reservation at that time, and the authorities which have been cited show conclusively that it was. The executive order, as the Supreme Court said in the *Wismer* case (246 U. S. 283, 288), "simply continued and gave formal sanction to what had been done before." There were no intervening rights to be cut off.

2. *Even assuming that control over the water of western streams passed to the States upon their admission to the Union, or by the statutes enacted in 1866, 1870, and 1877, the United States had power*

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[7] The opinion further states:

"This matter was before the Department in 1891, and Assistant Attorney General Shields rendered an opinion thereon July 7th of that year to the effect that the lands included in the Pyramid Lake Indian Reservation were excepted from the grant to the Central Pacific Railway Company. This opinion was forwarded by the Secretary of the Interior to the Indian Office with directions that it be guided thereby in its actions in connection with the reservation" (45 L. D. 502, 504).

in 1859 to reserve water for the irrigation of the reservation.—It is self-evident that the statutes of 1866, 1870, and 1877 have no bearing on the power of the United States to reserve water for the reservation in 1859. While the first opinion of the district court discusses these statutes, and particularly the act of 1877 (R. 403–410), it concedes (R. 410) that if water was reserved in 1859 that reservation of water was not affected by the subsequent statutes, since they did not affect existing rights.

Nor did the admission of Nevada and California to the Union defeat the reservation of water in 1859, even assuming that control over the disposal of the water passed to those States upon their admission.[8] Nevada was not admitted to the Union until 1864 (Presidential Proclamation of October 31, 1864, 13 Stat. 749). While California was admitted in 1850, it is clear that its admission did not, for two reasons, defeat the power of the United States to reserve water for the reservation in 1859.

In the first place, while the United States held the territory which later became the State of Ne-

[8] It is clear from the opinion of the Supreme Court in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, that control over the disposal of water of the streams of the public domain did not pass to the States by virtue of their admission to the Union, but remained in the United States at least until the statutes of 1866, 1870, and 1877. Speaking of the situation before the enactment of those statutes the Court said in that case (p. 162):

"As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately."

vada, it was entitled, as against California, to control the disposal of that portion of the water of the Walker River equitably allocable to the territory then under its control, under the principles of interstate water adjudication since enunciated by the Supreme Court.[9] No suggestion has been made—or is likely to be made in view of the extensive water rights awarded to Nevada lands in this suit—that the quantity of water reserved for the reservation exceeded the amount allocable to the territory held by the United Sates in 1859.[10]

In the second place, California did not, in 1859 or thereafter, assert any power to control the disposal of rights in the waters of the streams of the public domain in that State, but, on the contrary, expressly recognized the authority of the Federal Government in that field. In the leading case of *Lux* v. *Haggin,* 69 Cal. 255, 336 ff., 10 Pac. 674 (1886), the Supreme Court of California held that the United States had power to dispose of the waters of non-navigable streams of the public do-

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[9] See *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 101, 108, 110; *Arizona* v. *California*, 298 U. S. 558, 568; *New Jersey* v. *New York*, 283 U. S. 336, 342, 343; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669–671; *Wyoming* v. *Colorado*, 259 U. S. 419, 465, 470; *Kansas* v. *Colorado*, 206 U. S. 46, 97, 98; *Missouri* v. *Illinois*, 200 U. S. 496, 519–520; *Kansas* v. *Colorado*, 185 U. S. 125, 146.

[10] That such a question is open to determination in a suit to which the interested States are not parties, see *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110–111, and cases there cited.

main. The court said that by the Mexican law non-navigable streams were public property; that it might be claimed that this property became vested in the State of California upon its admission to the Union as an incident to the sovereignty, but that in 1850, shortly after the admission of the State, California passed an act, relating back to the time of its admission, adopting the common law, and that that act:

> should now be held to have operated (at least from the admission into the Union) a transfer or surrender to all riparian proprietors, of the property of the state—if any she had—in innavigable streams and the soils below them.

And the court went on to say (p. 338):

> And from a very early day the courts of this state have considered the United States government as the owner of such running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the state of California

as the owner of innavigable streams and their beds. And since the act of Congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval.[11]

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[11] In Cal. Stat. 1911 (California Civil Code (Deering, 1937) sec. 1410) the California Legislature provided:

"All water or the use of water within the state of California is the property of the people of the state of California."

In *Palmer* v. *Railroad Commission*, 167 Cal. 163, 138 Pac. 997 (1914), the Supreme Court of California nevertheless reaffirmed the doctrine of *Lux* v. *Haggin*, that the United States was the owner and had control over the disposal of waters of the public lands except as by the act of 1866 and later statutes it had permitted rights in such waters to be acquired as provided by the laws of the States. Referring to the statute above quoted, the court said, on rehearing (p. 175):

"All the water-rights which were in dispute in the case arose and were acquired by and under appropriations made long before the passage of the amendment aforesaid. It ought not to be necessary to remind any one that a law of this character is not retroactive, or that it cannot operate to divest rights already vested at the time it was enacted. The amendment may possibly be effective as a dedication to general public use of any riparian rights which the state, at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on a stream, rights in the stream which it would in such cases have in common with owners of other abutting land."

Even if it could be assumed that the State courts were incorrect in attributing to the United States title over the waters of the public domain and the control over their disposal, it is plain that the California statutes and decisions operated as a grant of such control to the United States, and as a recognition of all water rights derived from the United States. To hold otherwise would invalidate nearly every water right in California. And that the California statutes and decisions did operate as a grant to the United States of power to dispose of the water of the public domain is clear from the decision of the Supreme Court in *Donnelly* v. *United States,* 228 U. S. 243. In that case the question was whether an Indian reservation included the bed of a river which flowed through it. The doctrine which had been established by the adjudicated cases, cited in the *Donnelly* case, was that title to the beds of navigable streams passed to the States upon their admission to the Union, while title to the beds of non-navigable streams remained in the United States. As the reservation involved had been created subsequent to the admission of California to the Union, it was contended that if the river was navigable the reservation could not include the bed of the river, as the United States would have had no power to grant it to the Indians. The Supreme Court rejected this argument. It said that California had by statute classed the river in question as non-navigable and

that by the decision in *Lux* v. *Haggin,* referred to above, the Supreme Court of California had recognized that the title and power of disposal over the waters and beds of non-navigable streams was in the Federal Government. The Supreme Court said (p. 264):

> The authority of this decision was recognized in *Packer* v. *Bird,* 137 U. S. 661, 669. We are not able to find that the doctrine declared in it has since been departed from by the courts of the State.

And the Court went on to hold that by the statute and decision California had vested in the United States the title to the bed of the river if it were in fact navigable, and that if it were in fact non-navigable the same result would follow from the mere adoption of the common law. It is clear, therefore, that as far as California was concerned the United States had authority to make the reservation of water in 1859.

B. From the facts and circumstances attending the creation of the Walker River Indian Reservation it is to be implied that the United States reserved water for the irrigation of the reservation

1. *This case is governed by the principle of the Winters case.*—The appellees do not succeed, on pages 25–54 of their argument, in distinguishing on its facts the case of *Winters* v. *United States,* 207 U. S. 564. The several circumstances which they have set out (Br. 26–27) as the basis for their contention that the *Winters* case is inapplicable here

either are immaterial or depend on facts which exist in this case as well as in the *Winters* case. They say, for example:[12]

> b. That prior to the creation of the reservation [in the *Winters* case], the Indians of the Fort Belknap Reservation occupied a much larger tract of land which had been previously set aside as a reservation by an Act of Congress, which larger tract was deemed adequate for their wants in the light of their habits as a nomadic and uncivilized people.

This was one of several circumstances surrounding the creation of the Fort Belknap Reservation from which the Supreme Court concluded that a right to water for irrigation was impliedly reserved to the Indians (207 U. S. 576). Following its statement of this fact, the Court said:

> It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid

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[12] As their first distinction between this and the *Winters* case the appellees set out:

a. That the Fort Belknap Reservation of Montana was created pursuant to formal agreement or treaty between the United States and the Indians of the Fort Belknap Reservation, which treaty was ratified by Congress.

This purported distinction is discussed *infra*, p. 32ff.

> and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

The record indicates that the Pahutes in this case, before the Walker River and Pyramid Lake Reservations were created for them, inhabited at large the region of Utah Territory.[13] The Walker River and Pyramid Lake Reservations were set apart from Pahute country in the Territory of Utah and the United States took possession of the remainder of this country without formal relinquishment by the Indians. See Royce, Indian Land Cessions in the United States, 18th Ann. Rep. Bureau of Eth-

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[13] In recommending the creation of the reservations in 1859, Dodge, the agent for Indians in Utah Territory, wrote (R. 569–570):

"Yesterdays overland mail brought me advices from Carson Valley that there was a general stampede of persons from California to the mining localities within my agency which devolves on me additional reasons for appealing to your kind consideration in behalf of my Indians, and to the immediate necessity of reserving a sufficient portion of their lands to enable them to sustain life.

* * * * *

"The Indians of my Agency linger about the graves of their ancestors—'but the game is gone,' and now the steady tread of the white man is upon them. The green valleys too, once spotted with game 'are not theirs now.' * * *

"I sincerely hope that those asylums will be made for them, where they can be free from the influence of the 'White Brigands' who loiter about our great overland mail and emigrant routes—using them as their instruments to rob and plunder our citizens."

nology, 56th Cong., 1st Sess., H. R. Doc. No. 736, pp. 872–873. It was the policy of the United States to teach the Pahutes civilized ways and how to sustain themselves by the cultivation of the soil, and to help them establish permanent homes.[14] And it was its purpose, in creating the Walker River and Pyramid Lake Reservations, as it was in creating the Fort Belknap Reservation, to confine the Indians to a smaller tract than they formerly claimed or occupied, in order to fulfill this governmental policy of transforming the Indians into a settled agricultural people. And the Walker River Reservation, like the Fort Belknap Reservation, was arid

[14] Compare *Winters* v. *United States*, 143 Fed. 740, 745 (C. C. A. 9, 1906). This policy appears in appropriations for general incidental expenses of the Indian service in Utah Territory, including agricultural implements, Act of June 12, 1858, c. 155, 11 Stat. 329, 330; Act of June 19, 1860, c. 157, 12 Stat. 44, 58, and including also stock cattle and the erection of houses, Act of March 2, 1861, c. 85, 12 Stat. 221, 237. Also in numerous appropriations for the Indian service in Nevada Territory, and later in the State of Nevada for "presents of goods, agricultural implements, and other useful articles, and to assist them to locate in permanent abodes, and sustain themselves by the pursuits of civilized life." Act of March 3, 1863, c. 99, 12 Stat. 774, 791; Act of June 25, 1864, c. 148, 13 Stat. 161, 179; Act of March 3, 1865, c. 127, 13 Stat. 541, 558; Act of July 26, 1866, c. 266, 14 Stat. 255, 279; Act of July 28, 1866, c. 297, 14 Stat. 324, 326; Act of March 2 ,1867, c. 173, 14 Stat. 492, 512; Act of July 27, 1868, c. 248, 15 Stat. 198, 220; Act of April 10, 1869, c. 16, 16 Stat. 13, 36; Act of July 15, 1870, c. 296, 16 Stat. 335, 357; Act of March 3, 1871, c. 120, 16 Stat. 544, 567; Act of May 29, 1872, c. 233, 17 Stat. 165, 187; Act of February 14, 1873, c. 138, 17 Stat. 437, 460; Act of June 22, 1874, c. 389, 18 Stat. 146, 171; Act of March 3, 1875, c. 132, 18 Stat. 420, 445.

and practically valueless unless means of irrigation were provided (R. 390, 496, 626, 683).

Appellees' next differentiation of the *Winters* case is:

> c. That the treaty was entered into while Montana was a territory, and the land was Indian country.

This fact is relevant only to the question whether the creation of the States deprived the United States of power to reserve water rights to the Indians. That the United States had power in 1859 to reserve water rights under the laws of the State of California as well as in the Territory of Utah is shown, *supra,* pp. 13–24.

Appellees next say:

> d. That the Indians [in the *Winters* case] had appropriated the amount of water involved, and had applied it to beneficial use before the alleged illegal diversions of the defendants.

The Court noticed, in stating the facts in the *Winters* case (207 U. S. 564, 566), that certain quantities of water had been appropriated by the United States and the Indians before the defendants' appropriations occurred. But the Court placed no reliance on this fact in its opinion. If the early appropriations by the United States and the Indians had been a legally sufficient ground on which to sustain the right of the Indians to enough water for the irrigation of the reservation lands, the Court would not have deemed it necessary to

find an implied reservation of water rights from the facts and circumstances surrounding the creation of the Fort Belknap Reservation. The reason which underlies the implication of a reservation of water rights is found in the inability of the Indians to care for themselves, their resultant dependency upon the Government which has assumed a status of guardianship toward them, and the duty of the Government in the execution of its guardianship. This reason is inconsistent with any view that the water rights of the Indians depend upon appropriation. As stated by the court in *United States* v. *Conrad Investment Co.,* 156 Fed. 123, 129–130 (C. C. D. Mont., 1907), aff'd 161 Fed. 829 (C. C. A. 9, 1908):

> Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art. The government, however, being their guardian, has a most important trust to perform in this relation; that is, so to conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I may say, even possible future needs, when they have ultimately secured their allotments in severalty.
>
> * * * * *

> The Government has not to make a prior appropriation to enable it to obtain the use of the water. It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain.

Cf. *United States* v. *Hibner,* 27 F. 2d 909, 910–911 (D. Idaho, 1928).

Appellees say:

> e. That by this treaty the Indians agreed to occupy the reservation as a permanent home.

The record shows that the Walker River Reservation was selected for the Indians with a view to "reserving a sufficient portion of their lands to enable them to sustain life" (R. 569); that it would "have the advantage of being their home from choice," and that it was to be an asylum for the Indians, where they could be free from the influence of the "White Brigands" who loitered about the overland mail and emigrant routes (R. 570). It was repeatedly emphasized that the welfare of the whites as well as that of the Indians depended upon the isolation of the Indians upon a tract set apart for their exclusive use (R. 571, 575–577, 582–583, 584, 585–586, 587–588, 590–591, 592–593, 602, 603, 605). Whether or not the Walker River Pahutes agreed to occupy the reservation as a permanent home, they apparently did so occupy it, without objection. In any event the power of the United States to assign them to a

reservation set apart for their use and occupancy was not dependent on their consent. *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 486, 488; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 564; *United States* v. *Rickert,* 188 U. S. 432, 437, 443; *Sizemore* v. *Brady,* 235 U. S. 441, 447, 449; *United States* v. *Rowell,* 243 U. S. 464, 468. The general policy of the Government to teach the Indians civilized ways and the means of sustaining themselves by the cultivation of their reservations is undoubted. And the record amply shows the intention of the United States to execute this same policy in relation to the Indians it placed on the Walker River Reservation (Gov't Br. 9; *supra,* p. 27).

Appellees' final distinction of the *Winters* case is:

> f. The Indians were found by the Court to have been deprived of sufficient water to carry on agriculture under their changed conditions of living outlined in the treaty, and it was urged that, by reason of the treaty, there was an implied agreement on the part of the United States to reserve with the land, waters for the irrigation of the diminished area by the treaty.

The United States contends, and the appellees nowhere deny, that the water remaining in the Walker River after the diversions of the appellees is insufficient for the Indians of the reservation to support themselves by agriculture. And it is, of

course, urged that, by the creation of the reservation with the intention that the Indians thereon should sustain themselves by agriculture and learn civilized ways, the United States impliedly reserved to the Indians water for the irrigation of the reservation.

2. *Whether a reservation was created by treaty, executive order, or by other means is not determinative of the question whether water rights were reserved for the Indians.*—Of the several factors which the appellees seek to establish as distinguishing this case from the *Winters* case, they emphasize most strongly the following:

> a. That the Fort Belknap Reservation of Montana was created pursuant to formal agreement or treaty between the United States and the Indians of the Fort Belknap Reservation, which treaty was ratified by Congress.

The notion that a reservation of water can arise only in the presence of a formal treaty or agreement finds apparent support in the fact that most of the cases in which such a reservation has been found are cases in which there was a treaty (but cf. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78), and that when the courts have refused to find an implied reservation of water they have sometimes mentioned, among other distinguishing factors, that the *Winters* case involved an agreement with the Indians. See *United States* v. *Wightman,* 230 Fed. 277, 282 (D. Ariz., 1916).

The Court in the *Winters* case, moreover, relied in part on the canon that treaties with the Indians are to be construed in their favor (207 U. S. 564, 576–577; see also *United States* v. *Stotts,* 49 F. 2d 619, 620 (W. D. Wash., 1930)). A closer examination of the decisions discloses, however, that whether there is an implied reservation of water rights does not depend upon the existence of an agreement or an exchange of land between the United States and the Indians: it depends rather on whether the United States had power to reserve water rights, and, if it did, on whether, in the light of all of the pertinent circumstances, including the general governmental policy to civilize the Indians and assist them in the establishment of permanent homes, and including the facts as to the physical situation of the reservation in question, it is reasonably to be inferred that a reservation of water rights was intended. That the implied reservation depends upon the power of the United States in the premises, and its intention and purpose in the exercise of that power, is clear from the opinion in *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87–89 (see Gov't Op. Br. 28–29). Similarly, in *United States* v. *Powers,* 83 L. Ed. (Adv. Ops.) 321, 324, decided by the Supreme Court on January 9, 1939, the Court, in finding by implication from a treaty that sufficient waters for irrigation were reserved from the streams within the Crow Indian Reservation, did not rely upon

any doctrine of construction peculiarly applicable to treaties. It said only:

> Manifestly the Treaty of 1868 contemplated ultimate settlement by individual Indians upon designated tracts where they could make homes with exclusive right of cultivation for their support and with expectation of ultimate complete ownership. Without water productive cultivation has always been impossible.
>
> We can find nothing in the statutes after 1868 adequate to show Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes.

In *Donnelly* v. *United States,* 228 U. S. 243, 259, discussed *supra,* pp. 23–24, it was held that a reservation created by an executive order, which described the reservation as "a tract of country one mile in width on each side of the Klamath River," included the bed of the Klamath River. The Court said:

> * * * in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river. As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.

In *United States* v. *Wightman,* 230 Fed. 277 (D. Ariz., 1916), cited by appellees (Br. 41), an Indian reservation created by executive order included land on which there were certain springs. This land, as well as the land occupied by the defendant, had formerly been part of a military reservation, and the water of the springs in question had been used for domestic and agricultural purposes on the military reservation. The land when opened to entry was appraised as including the value of the spring water for irrigation, and the defendant paid for and used the water. The court held that the spring water was not reserved to the Indians. Distinguishing the *Winters* case, it said (230 Fed. 277, 282):

> The decision in that case is based solely on the agreement with the Indians and the implications which the court draws from the facts surrounding the creation of the Ft. Belknap reservation, and it is expressly stated therein that the reservation as a whole would be made unfit for the purposes for which it was created and incapable of maintaining the Indians if the waters of the Milk river were diverted as was done by the defendants.

The court found that an ample supply of water flowed from other springs on the reservation, and that the water of the springs in question was not necessary to the objects for which the reservation was created. The court said (230 Fed. 283):

> The decision [in the *Winters* case] is not an authority that the mere creation ex vi termini reserves to the Indians, or to the United States for their benefit, the beneficial use of all waters flowing within the reservation * * *.
>
> It is not alone a question of the *power* of the United States to devote these waters to the exclusive use of the Indians, but it is a question of whether it has *exercised the power.*

With this statement the Government concurs, and it concurs also in the view that to determine whether the power to reserve waters has been exercised all the surrounding circumstances, and especially the necessity of the water for irrigation, must be examined. The mere fact that the reservation is created by executive order, instead of by treaty, is not determinative.

In *Byers* v. *We-Wa-Ne,* 86 Or. 617, 169 Pac. 121 (1917), discussed by appellees (Br. 43), the court held that the water rights there in question vested in the contestants and not in the United States or the Indians: First, because Congress, by a statute passed long after the reservation was created, recognized and confirmed the contestants' right; second, because the treaty creating the reservation in 1855 did not impliedly reserve the water rights to the Indians. In discussing the second point, the court said (p. 635):

> Consideration may be given to the purposes in view and to the situation of the parties,

> but unless the implication of these water rights is found in the treaty when read in the light of these purposes and circumstances, the rights contended for must be held to be nonexistent.

The court distinguished the *Winters* case and *United States* v. *Conrad Investment Co.,* 156 Fed. 123, aff'd, 161 Fed. 829 (C. C. A. 9, 1908), on the ground that in those cases there was a manifest intent that the Indians should farm the land, and the land could not be farmed without irrigation. These factors were missing in the *Byers* case, and because the right claimed was "not essential to the maintenance of the Indians or to their progress in the arts of civilized life" the court found no implied reservation of waters.

In *United States* v. *Stotts,* 49 F. 2d 619 (W. D. Wash., 1930), cited by appellees (Br. 44), the question was whether a reservation which was created by an executive order made pursuant to a treaty with the Indians included tidelands along one side of the reservation. The court held the tidelands were a part of the reservation, since the United States had power to grant the tidelands to the Indians and since the executive order expressly defined the boundary at low-water mark. The court noted that the executive order was in accordance with the interests of the Indians and the object for which the reservation was created, since the tidelands were necessary to fishing.

In *Taylor* v. *United States,* 44 F. 2d 531 (C. C. A. 9, 1930), cited by appellees (Br. 46), the reservation was created by executive order made pursuant to treaty, and the controversy involved the title to the bed of a navigable stream. The reservation in question was created before the State was admitted to the Union, and this Court conceded the power of the United States to grant away tideland and submerged land (44 F. 2d 533). It found, however, no intention on the part of the Government to reserve for the Indians the lands covered by navigable waters, or to except the case from the general policy of the Government to hold such property in trust for the future States. *United States* v. *Holt Bank,* 270 U. S. 49, cited by appellees (Br. 45), is substantially to the same effect.

Plainly the general principle to be derived from all of these cases is that the question whether a reservation of water is to be implied is to be determined from a consideration of the power of the United States to dispose of the right, the purpose and intent for which the public lands were withdrawn, and whether a reservation of water rights is necessary to accomplish that purpose.

The appellees seek to dismiss from consideration the *Winters* case and other cases cited by the United States, on the ground that those cases rest upon the construction of a treaty (Br. 29–31). They purport to distinguish *Alaska Pacific Fisheries* v. *United States,* cited on page 27 of the Government's brief, as involving only a construction

of what Congress meant in using the words, "the body of lands known as Annette Islands" (Br. 50). But the action of the Commissioner of Indian Affairs and of the Commissioner of the General Land Office is as susceptible of construction and as needful of construction as is a treaty or statute. Statutes passed for the benefit of dependent Indian tribes or communities, as well as treaties made with them, are to be liberally construed, and doubts resolved in favor of the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89; *United States* v. *Nice,* 241 U. S. 591, 599; *United States* v. *Celestine,* 215 U. S. 278, 290; *Cherokee Intermarriage cases,* 203 U. S. 76, 94. This rule has its basis in the Government's duty of protection of a dependent people. *Choate* v. *Trapp,* 224 U. S. 665, 675; *United States* v. *Pelican,* 232 U. S. 442, 450; *United States* v. *Nez Perce County, Idaho,* 95 F. 2d 238 (C. C. A. 9, 1938). The rule of strict construction, said by the appellees to apply to grants of the sovereign (Br. 30) has no application to statutes or treaties made by the United States in relation to Indians. No valid reason is apparent why it should apply in the construction of departmental or executive conduct pertaining to the Indians.

The appellees assert (Br. 31–34, 59) that the Paiute Indians have no interest in either the lands or waters of the Walker River Reservation, whether by aboriginal occupation or by the acts of the commissioners or the executive order

of the President. But, as has been shown, it is clear that the acts of the Commissioner of Indian Affairs and of the Commissioner of the General Land Office in 1859, and the tacit consent of the Secretary of the Interior in those acts, conferred upon the Walker River Indians a right of occupancy in the Walker River Reservation. This right of occupancy was recognized by Congress in the Act of May 27, 1902, c. 888, 32 Stat. 260, which provided for the allotment of lands on the reservation,[15] and that—

> when a majority of the heads of families on said reservation shall have accepted such allotments and consented to the relinquishment of the right of occupancy to land on said reservation which can not be irrigated from existing ditches and extensions thereof and land which is not necessary for dwellings, school buildings or habitations for the members of said tribe, such allottees who are heads of families shall receive the sum of three hundred dollars each to enable them to commence the business of agriculture. * * *

Appellees (Br. 51) assert that the action of officers and department heads in charge of the

[15] The existence of the Walker River Reservation was repeatedly recognized by Congress in acts appropriating money for its maintenance. Act of June 22, 1874, c. 389, 18 Stat. 146, 147; Act of March 3, 1875, c. 132, 18 Stat. 420, 421, 422; Act of August 15, 1876, c. 289, 19 Stat. 176, 177; Act of March 3, 1877, c. 101, 19 Stat. 271, 272; Act of May 27, 1878, c. 142, 20 Stat. 63, 85; Act of February 17, 1879, c. 87, 20 Stat. 295, 314.

Walker River Reservation is conclusive that there was no intention on the part of the United States to reserve water rights when the reservation was created. They base this proposition upon the application for permit to appropriate waters of the State of Nevada, filed with the state engineer on December 24, 1910, by the Superintendent of the Walker River Reservation (Br. 51), and upon the disposition of the upstream lands by patent to the white settlers (Br. 52).[16]

The applications made by the Superintendent of the Reservation in 1910 and by the Walker River Indian agent in 1906 were admitted in evidence subject to the objection that they were not shown to have been made by the authority of any executive or administrative officer of the United States, or of Congress (R. 821–822, 824). On December 2, 1920, the Assistant Commissioner of Indian Affairs wrote the Superintendent of the Walker River School (R. 966):

> In the absence of legislation by Congress, the lands and water rights belonging to the Indians within Indian reservations are not subject to the operation of State statutes.

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[16] Although the district court treated these matters as having to do with administrative construction in its first opinion (R. 403), in its second opinion it dealt with them in connection with laches, estoppel or equitable defenses (R. 492–493), as had the master (R. 271–274), and they were treated under the latter head in the Government's opening brief, pp. 50–55.

> As a matter of law, therefore, the Indians or the Indian Service representing the Federal Government cannot be compelled to comply with State statutes relative to the acquisition of water rights. As a matter of comity, or courtesy to State officials, however, it has been the practice to at least advise such officials of the rights of the Indians in order that due notice may be had thereof in adjudications by State officers of water rights pertaining to lands in white ownership. The actual filing of an application for permit pursuant to State statutes is not necessary and appears to have been undertaken through a misconception of the situation with reference to matters of this kind. Your action in partly filling out the blank form showing proof of beneficial use, while not absolutely necessary in order to protect the water rights of the Indians, was not at least improper, in that it is not seen how any direct injury will result therefrom. The chief difficulty in matters of this kind is the impression created in the minds of State officials and others that compliance with the State law, or attempt to comply with such law, is an admission that the State and the State officers have jurisdiction over the matters involved therein.

The water permit issued by the State Engineer pursuant to the application of 1910 was endorsed:

> Cancelled June 6, 1921, because of failure of applicant to comply with provisions of permit [R. 824].

The record does not state in what respect the conditions of the permit were not complied with, but it may be presumed, since the cancellation followed soon after the above-quoted letter, that no effort was made to comply because the rights of the Indians and the Government were not dependent on state law. The administrative conduct upon which the appellees rely to show the absence of intent on the part of the Government to reserve water rights was thus not the conduct of the Department of the Interior, but the unauthorized conduct of the local Indian agents on the reservation, which was disapproved by the Office of Indian Affairs.

To prove that water rights were not reserved, the appellees point to the fact that patents were issued to the settlers. In addition to what is said in the Government's opening brief, pages 51–52, it may be noted that in *Winters* v. *United States,* 207 U. S. 564, the decree was entered upon the bill and answer, and the answer alleged that the defendants, before any appropriation, diversion, or use of the waters was made by the United States or the Indians on the Fort Belknap Reservation, and without notice of any claim on the part of the United States or the Indians, and believing that all the waters were open to appropriation, made entry and proof and received patents to their lands in fee simple (207 U. S. 564, 568, 569). Yet the pleading of these facts did not influence the Court's decision. See also *United States* v. *Conrad Investment Co.,* 156 Fed. 123, 131–132 (C. C. D. Mont.,

1907), aff'd 161 Fed. 829, 833–834 (C. C. A. 9, 1908) (Gov't Op. Br. 45).

II

The United States is not barred from the relief it seeks by laches, estoppel, or any other principle of equity

It is believed that the question of laches, estoppel, and equitable principles is adequately discussed in the Government's opening brief (Br. 33–61). The remarks here will be limited to calling the attention of the Court to certain matters in which it is thought the appellees, in their argument, have fallen into error.

The appellees state (Br. 59), citing *United States* v. *Chandler-Dunbar Water Power Co.,* 152 Fed. 25, 41 (C. C. A. 6, 1907), that the United States, in disposing of the upstream lands to the appellees, was acting in a proprietary capacity, and therefore that it should be bound by its conduct in the same manner as an individual. But in *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 158, it was pointed out that:

> The United States do not and cannot hold property, as a monarch may, for private or personal uses. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common defence and general welfare of the United States." Constitution, art, 1, sect. 8, cl. 1.

To the same effect is *Utah Power & Light Co.* v. *United States,* 230 Fed. 328, 337 (C. C. A. 8, 1915). While a State may act in either a sovereign or a proprietary capacity, see *South Carolina* v. *United States,* 199 U. S. 437, 463; *Los Angeles* v. *Los Angeles Gas Corp.,* 251 U. S. 32, 38–39, the United States can act only under the powers conferred upon it by the Constitution; it cannot act except as a sovereign. This suit, moreover, is brought by the United States in its sovereign capacity and not merely as a nominal party. *United States* v. *Minnesota,* 270 U. S. 181, 194. In *United States* v. *Beebe,* 127 U. S. 338, cited by the appellees (Br. 66) for the proposition that the United States has been held barred on facts analogous to those involved here, the United States was merely a nominal party plaintiff and had no interest in the controversy (127 U. S. 347). In such cases, the immunity from laches does not apply in behalf of the private party who is the true party plaintiff. *United States* v. *New Orleans Pac. Ry. Co.,* 248 U. S. 507, 519.

The appellees (Br. 55) derive from *State* v. *Towessnute,* 89 Wash. 478, 154 Pac. 805 (1916), the equitable principles which, they contend, should prevail in this case. That was a criminal prosecution of an Indian for fishing without a license, and the considerations that affected the court's decision obviously have no application in determining

whether water rights were reserved for the irrigation of arid lands of a reservation.

The appellees state that the United States is seeking to deprive white settlers of water which they have been using for sixty-five years for the benefit of non-existent Indians on uncultivated lands (Br. 68). Here, as in other portions of their brief, the appellees are endeavoring to color the record by exaggerating the loss that will fall to them from the decree sought by the Government, and by minimizing the usefulness and importance to the Indians of the rights asserted for them. The decree sought will merely secure to the Indians the right to so much water as they can beneficially use on the reservation. The area now under cultivation is 2,100 acres (R. 246, 496), and the decree will not immediately deprive the appellees of any water that cannot be used on these 2,100 acres. Finally, if any of the upstream white settlers must relinquish any of the water which they have unlawfully been using, it will not be the pioneers or their descendants; it will be the junior appropriators who have acquired their lands in comparatively recent years, with full knowledge that a large part of the water had already been appropriated, and that the water in which they could acquire rights would only be the water remaining after all other rights were satisfied.

CONCLUSION

For the reasons stated in this brief and in the Government's opening brief it is respectfully sub-

mitted that the decree of the district court should be reversed.

CARL MCFARLAND,
Assistant Attorney General,
ROY W. STODDARD,
C. W. LEAPHART,
Special Assistants to the Attorney General,
THOMAS HARRIS,
ROBERT KOERNER,
Attorneys, Department of Justice,
Washington, D. C.

MARCH 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939